

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARK EDWARD WAYT,)
Petitioner,) 4:06cv3134
vs.) ORDER on INITIAL REVIEW
ROBERT HOUSTON,¹)
Respondent.)

This matter is before the court for initial review of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("§ 2254 petition") filed by the petitioner, Mark Edward Wayt, a prisoner in the custody of the Nebraska Department of Correctional Services. 28 U.S.C. § 2254 affords habeas corpus relief to "a person in custody pursuant to the judgment of a State court [who] is in custody in violation of the Constitution or laws ... of the United States." *Id.* § 2254(a). Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts*, as amended effective December 1, 2004, states:

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

This case has been assigned to District Judge Richard G. Kopf. However, a Magistrate Judge may conduct initial review. Rule 10 of the *2254 Rules*, as amended, states: "A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636."

The petitioner alleges violations of his civil rights in connection with his conviction in the District Court of Cheyenne County, Nebraska, on or about September 26, 2004, of

¹The court, sua sponte, substitutes Robert Houston, Director of the Nebraska Department of Correctional Services, as the plaintiff's custodian. The Clerk of Court shall modify the court's records accordingly.

possession of a controlled substance, driving under a suspended license, and fourth offense driving under the influence. On initial review of the § 2254 petition, I provisionally find that summary dismissal under Rule 4 of the § 2254 *Rules* is not required and that the respondent shall answer or otherwise respond to the § 2254 petition.

IT IS THEREFORE ORDERED:

1. That the Clerk of Court shall mail copies of the § 2254 petition to the respondent and to the Nebraska Attorney General by regular first-class mail; the Clerk of Court shall modify the court's records to substitute Robert Houston as the respondent;
2. That, within twenty (20) days of the date of this Order, the respondent shall file an Answer to the § 2254 petition on the merits of the claims and any affirmative defenses, in the manner contemplated by Rule 5 of the *Rules Governing Section 2254 proceedings in the United States District Courts*, as amended effective December 1, 2004, or the respondent may, in his discretion, limit his response to affirmative defense(s) by filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b);
3. That, whether the respondent files an answer or a motion for summary judgment, the respondent shall also file with the court and serve on the petitioner a pleading entitled Designation of Relevant State Court Records;
4. That all records listed in the respondent's Designation of Relevant State Court Records shall be filed with the court at the time the Designation of Relevant State Court Records is filed;
5. That if the respondent elects to file a motion for summary judgment, copies of all records designated and filed in support of the motion shall also be served on the petitioner;
6. That, whether the respondent files an answer or a motion for summary judgment, the petitioner may reply within 20 days thereafter; and
7. That, if necessary and requested in writing, each party shall be entitled to one short extension of time.

DATED this 28th day of August, 2006.

BY THE COURT:

s/ F. A. GOSSETT
United States Magistrate Judge